

The FCC's Broadcast Media Ownership and Attribution Rules: The Current Debate

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Summary

The Federal Communications Commission's (FCC's) broadcast media ownership rules, which place restrictions on the number of media outlets that a single entity can *own or control* in a local market or nationally, are intended to foster the three long-standing goals of U.S. media policy—competition, localism, and diversity of voices. The FCC is statutorily required to review these rules every four years to determine whether they continue to serve the public interest or should be modified or eliminated. One part of these rules, the FCC's attribution rules, identify criteria for determining when an entity holds sufficient ownership or control of a broadcast station that such ownership or control should be attributed to the entity for the purposes of applying the media ownership rules.

In December 2011, the FCC proposed a number of rule changes, which it has not yet adopted. It proposed eliminating its Radio/Television Cross-Ownership rule because it is no longer needed to foster the goals of diversity of voices and localism. It also proposed modifying its Newspaper/Broadcast Cross-Ownership rule to allow certain types of combinations in the 20 largest markets. It proposed a technical change in its Local Television Ownership Rule, but otherwise would continue to prohibit ownership of two stations in a local market unless one is not among the four highest-ranked stations in the market and, after the combination, there would still be eight independently owned and operating commercial full-power television stations. The FCC proposed that its Local Radio Ownership and Dual Network rules be retained as is. The FCC also sought public comment on how to define the criteria for an entity to be eligible for programs intended to promote the diversity of media ownership, and, in particular, to promote ownership by women and minorities.

In recent years, many television stations have entered into sharing arrangements with other stations in their local market to jointly sell advertising and/or produce local news programming, typically with one station managing that shared operation and perhaps providing most or all of the staffing and other resources. The FCC sought public comment on how, for the purposes of the media ownership rules, to attribute control of a broadcast television station that has entered into such a sharing arrangement. Currently, the only sharing agreement-related attribution rule for television stations covers local marketing agreements in which one station both purchases blocks of time from another station in the same market and sells the advertising for the purchased time—that is, the broker station provides both the programming and the advertising—for at least 15% of the brokered station's broadcasting time. The FCC has enforced this as a bright-line rule. As long as (1) the block of time covered by an agreement does not exceed 15% of the brokered station's programming time, and (2) the agreement contains a certification and perhaps other language indicating that the licensee of the brokered station maintains ultimate control over station finances, personnel, and programming, the agreement will not trigger the attribution rule. Other evidence is considered immaterial. As a result, in many cases the FCC has not deemed a station to have control over another station in the same market even if such control is considered to exist, and must be reported, under generally accepted accounting practices. Such agreements create what is known in the industry as "virtual duopolies."

In late 2012, the FCC released—and made available for public comment—a report on broadcast ownership by gender, ethnicity, and race, and invited the public to comment on how its proposed ownership rule changes might affect female and minority ownership. It delayed adoption of new broadcast ownership rules until those public comments could be analyzed. It is expected to adopt new rules early in 2013.

Contents

Overview 1
Proposed Rules, Information Requests, and Questions Posed in the FCC's Notice of Proposed Rulemaking 4
Ownership Rules 4
Sharing Agreements and Attribution Rules 4
Entities Eligible for Programs to Foster Broadcast Ownership Diversity 5
The Radio/Television Cross-Ownership Rule 7
Current Rule 7
Proposed Rule Change 7
Newspaper/Broadcast Cross-Ownership Rule 8
Current Rule 8
Proposed Rule Change 9
Local Television Ownership Rule 11
Current Rule 11
Proposed Rule Change 12
Request for Additional Public Comment on Waivers and on Multicasting 13
Local Radio Ownership Rule 14
Current Rule 14
Proposed Rule Change 15
Dual Network Rule 15
Current Rule 15
Proposed Rule Change 16
Sharing Agreements and Attribution Rules 16
Sharing Agreements Involving the Production of News Programming 19
The FCC's Attribution Criteria and "Virtual Duopolies" 22
The Information and Analysis Needed to Construct Policy on Attribution Rules and Sharing Agreements 28

Contacts

Author Contact Information 29

Overview

The Federal Communications Commission's (FCC's or Commission's) broadcast media ownership rules,[1] which place restrictions on the number of media outlets that a single entity can *own or control* in a local market or nationally, are intended to foster the three long-standing goals of U.S. media policy—competition, localism, and diversity of voices. The FCC is statutorily required to review these rules every four years to determine whether they continue to serve the public interest or should be modified or eliminated.[2]

The FCC's attribution rules identify criteria for determining when an entity holds sufficient ownership or control of a broadcast station that such ownership or control should be attributed to the entity for the purposes of applying the media ownership rules.[3] According to the FCC, its attribution rules "seek to identify those interests in or relationships to licensees that confer a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[4]

On May 25, 2010, the Commission adopted a Notice of Inquiry to obtain public input for the most recent review of its media ownership rules.[5] It held public hearings and commissioned and released 11 economic studies performed by outside researchers and commission staff that provided data on the impact of market structure on competition, localism, and diversity of voices.

On December 22, 2011, the Commission adopted a Notice of Proposed Rulemaking (NPRM)[6] in which it tentatively proposed loosening or eliminating some of the current constraints on cross-ownership of media outlets in local markets. For the Local Television Ownership rule that it proposed to retain, it sought additional public comment on whether to adopt a waiver standard applicable to small markets and whether digital multicasting should be a factor in determining the television ownership limits. The NPRM also asked questions and sought public comment on how (for the purposes of the media ownership rules) to attribute control of a broadcast station when that station has entered into certain types of sharing arrangements with another station in the same market, suggesting that the FCC might consider some changes to its attribution rules that could have the effect of tightening ownership restrictions. The NPRM also asked questions and sought public comment on how to define the criteria for an entity to be eligible for programs intended to

[1] 47 C.F.R. 73.3555.

[2] Section 629 of the FY2004 Consolidated Appropriations Act, P.L. 108-199, modified Section 202(h) of the Telecommunications Act of 1996 (P.L. 104-104), instructing the FCC to perform a quadrennial review of all of its broadcast media ownership rules, except the National Television Ownership rule.

[3] 47 C.F.R. 73.3555 Note 2.

[4] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy,* MM Docket Nos. 94-150, 92-51, and 87-154, Report and Order (1999 Attribution Order), adopted August 5, 1999 and released August 6, 1999, at para. 1.

[5] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, Notice of Inquiry, adopted and released May 25, 2010.

[6] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996: Promoting Diversification of Ownership in the Broadcasting Services,* MB Dockets No. 09-182 and 07-294, Notice of Proposed Rulemaking (NPRM), adopted and released December 22, 2011.

promote the diversity of media ownership—and, in particular, to increase the level of broadcast station ownership by minorities and women.

In public comments that were submitted on March 5, 2012, broadcasters argued that they face increased competition from non-broadcast media outlets (especially cable networks and Internet websites) that has reduced their audience and revenues and also that existing ownership constraints keep them from exploiting economies of scale that would allow them to offer more local news programming.[7] They therefore seek to loosen existing ownership restrictions. They also oppose expansion of attribution rules or reporting requirements related to sharing arrangements because, they claim, such requirements would impede their ability to attain efficiencies that lead to improved programming.[8]

Several consumer groups argue that the primary focus of the current review of FCC rules should be on the relationship between market structure, ownership rules, and minority and female ownership, and claim that the FCC has failed to perform analysis that would justify its proposed loosening of existing rules.[9] They allege that such analysis would demonstrate that without more stringent ownership rules ever fewer stations will be available for ownership opportunities for minorities and women.[10] Small cable companies, which must negotiate with broadcasters for permission to retransmit broadcast signals,[11] claim that ownership or contractual arrangements that allow one station to negotiate on behalf of multiple stations in a market give the broadcasters an unfair advantage and harm consumers by raising cable costs (and hence prices) and should be prohibited.[12]

Although all of the tentative rules, information requests, and questions in the NPRM have elicited comment, the proceeding has generated especially lively debate about the interaction between the FCC's Local Television Ownership rule and its attribution rules. Although no systematic database exists to confirm this, broadcasters, consumer groups, and other commenters seem to agree that

[7] See, for example, *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Comments of the National Association of Broadcasters (NAB March 2012 Comments), March 5, 2012, at p. ii.

[8] See, for example, *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Comments of Sinclair Broadcast Group, Inc. (Sinclair March 2012 Comments), March 5, 2012, at p. 5.

[9] See, for example, *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Comments of Free Press (Free Press March 2012 Comments), March 5, 2012, at pp. 8-17.

[10] See, for example, *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-24, Comments of Office of Communication of United Church of Christ, Inc., Media Alliance, National Organization for Women Foundation, Communications Workers of America, Common Cause, Benton Foundation, Media Council Hawai'i (UCC March 2012 Comments), March 5, 2012, at pp. 23-29.

[11] Section 325(b) of the Communications Act, which was enacted as part of the 1992 Cable Act, requires cable operators that seek to retransmit the signal of a broadcaster to obtain the consent of that broadcaster.

[12] See *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-24, Comments of American Cable Association (ACA March 2012 Comments), at p. 2.

the number of sharing arrangements among television stations in which one station contractually takes on some functions for one or more other stations in the same market is growing. Most (but not all) broadcasters view these sharing agreements as necessary to take advantage of scale economies they are otherwise denied by the restrictions in the ownership rules on formal combinations. Critics, however, view them as "an end around the prohibitions against controlling two top four television stations and/or controlling more than one (or two in larger markets) television stations in the same market."[13] Moreover, the critics claim that the FCC has improperly allowed sharing agreements under which one station has de facto control over the programming and core operations of another station in the same local market, thus effectively circumventing the Local Television Ownership rule.[14]

In November 2012, the FCC adopted and released a report on current ownership of broadcast stations—full power commercial, Class A, low power, commercial AM radio, and commercial FM radio—by gender, ethnicity, and race.[15] After several parties requested an additional, formal opportunity to comment on the report, the FCC established a public comment cycle, noting that the report confirmed that women and minorities continue to "own broadcast stations in disproportionately small numbers."[16] The Commission delayed adoption of its new broadcast media ownership rules until those comments, which might address the potential impact of its proposed rule changes on female and minority ownership, could be submitted and reviewed. The FCC is expected to adopt final media ownership rules early in 2013.

The FCC's on-going quadrennial review process has identified two general areas of inquiry that may be of interest to Congress. First, there is the traditional policy debate: do each of the FCC's current media ownership and attribution rules foster the long-standing policy goals of localism, diversity of voices, and competition, or should some rules be eliminated or modified or new rules added? In that regard, there is the possibility that a rule change to foster one goal might harm another goal and Congress might want to provide the FCC with guidance on how to proceed in that situation. Second, has the FCC constructed, interpreted, and enforced its attribution rules in a fashion that allows a single entity to control two of the four highest-rated stations in a market in apparent contradiction of the Local Television Ownership rule? Has the FCC, as a result, in effect changed its policy with respect to ownership without changing its rules?

[13] *In the Matter of 2010 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules,* MB Docket No. 09-182, Comments of Office of Communication of United Church of Christ, Inc., Media Alliance, Common Cause, Benton Foundation (UCC 2009 Comments), November 20, 2009, at p. 13.

[14] See, for example, UCC November 2009 Comments at pp. 12-14.

[15] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182 and 07-294, Report on Ownership of Commercial Broadcast Stations, adopted and released November 14, 2012.

[16] "Commission Seeks Comment on Broadcast Ownership Report," FCC Public Notice DA 12-1946, MB Docket Nos. 09-182 and 07-294, released December 3, 2012.

Proposed Rules, Information Requests, and Questions Posed in the FCC's Notice of Proposed Rulemaking[17]

Ownership Rules

With respect to the specific ownership rules, the FCC tentatively concluded that:

- The current Radio/Television Cross-Ownership rule should be eliminated.
- The current Newspaper/Broadcast Cross-Ownership rule should be modified to include the major elements of a rule that it adopted in its previous quadrennial review but was vacated and remanded by the Court of Appeals for the Third Circuit for procedural reasons.[18] The proposed new rule would deem it presumptively consistent with the public interest for an entity to own or control both a major daily newspaper and a television or radio station in a local market if (1) the combination is in one of the 20 largest local markets, (2) for television (but not for radio), the station is not among the four highest-rated stations in the market (for radio, there is no restriction on the station's rating), and (3) after the transaction there still are at least eight independently owned and operating major media voices in the market.
- The current Local Television Ownership rule should be retained with minor modifications that take into account the transition (that has already taken place) from analog to digital transmission of broadcast television signals.
- The current Local Radio Ownership rule should be retained as is.
- The current Dual Network Rule should be retained as is.

Sharing Agreements and Attribution Rules

The media ownership rules place restrictions on the number of media properties that a single entity can own *or control* in a particular local market. Increasingly, television stations are entering into sharing agreements with other stations in their market. These agreements are legal, but may result in one station effectively controlling the programming decisions or other core operating functions of the other station. In such a situation, the first station could be viewed as controlling the second station, for the purposes of the ownership rules. The FCC has adopted attribution rules that identify certain financial or other interests in a broadcast station, including sharing agreements, that constitute control over that station and must be counted in applying the broadcast ownership rules.[19]

[17] This section presents the proposed rules, information requests, and questions as framed in the FCC's NPRM. As explained in later sections, the public comments identified related issues—such as how the FCC has been implementing, interpreting, and enforcing its existing media ownership and attribution rules—that the Commission itself did not raise in the NPRM.

[18] *Prometheus Radio Project v. FCC*, 652 F.3d 437 (2011) (*Prometheus II*). The court concluded that the Commission had failed to comply with the notice and comment provisions of the Administrative Procedures Act. The court did not address the Commission's substantive modifications to the rule.

[19] 47 C.F.R. 73.3555 Note 2.

Currently, if two radio stations or two television stations in a local market enter into a local marketing agreement (LMA—sometimes referred to as time brokerage agreement or TBA), in which one station (the "broker" station) purchases discrete blocks of time from the other station and supplies programming and sells advertising for the purchased time, and that brokered time exceeds 15% of the weekly broadcast time of the "brokered" station, an FCC rule attributes control of the station to the broker station.[20] Also, if two radio stations (but not television stations) in a local market enter into a joint sales agreement (JSA)—an agreement for the joint sales of broadcast commercial time—in which the broker station sells more than 15% of the advertising time per week of the brokered station, a rule attributes control of the station to the broker station even though such agreements do not involve programming decisions.[21] In 2004, the FCC tentatively concluded that JSAs have the same effect in local television markets as they do in local radio markets and therefore proposed extending the JSA attribution rule to television stations,[22] but it has never adopted a final order. Neither LMAs nor JSAs are precluded by any Commission rule or policy as long as the Commission's multiple ownership rules are not violated and the participating licensees maintain ultimate control over their facilities.

In recent years, stations have begun to enter into other types of sharing arrangements with stations in their local markets that may not be addressed in the current attribution rules. For example, under local news service (LNS) agreements multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor. Under shared service agreements (SSAs) one television station provides operational support and programming for another station in the same market, in some cases producing the news content for one or more other stations.[23]

In its NPRM, the FCC seeks public comment on whether and how to attribute control of stations that have entered into such arrangements, with an apparent interest in agreements among television stations in a local market that explicitly involve news programming.[24] The FCC does not propose any new or modified attribution rules in the NPRM, but by asking questions and seeking comment it is signaling that it might make changes to its attribution rules in a final order.

Entities Eligible for Programs to Foster Broadcast Ownership Diversity

Congress and the FCC have a history of supporting actions—rules, policies, programs, guidelines—intended to foster diversity of broadcast station ownership, in general, and minority and female ownership, in particular, as a means to achieve the goal of diversity of voices.[25] The courts have reinforced the notion that minority ownership is a valid concern that should be addressed by the FCC when constructing its media ownership rules,[26] but also have set

[20] 47 C.F.R. 73.3555 Note 2(j).

[21] 47 C.F.R. 73.3555 Note 2(k).

[22] *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets,* MB Docket No. 04-256, Notice of Proposed Rulemaking, adopted July 3, 2004 and released August 2, 2004, 19 FCC Rcd 15238.

[23] NPRM at para. 199.

[24] NPRM at para. 195.

[25] See CRS Report RL34269, *Minority Ownership of Broadcast Properties: A Legal Analysis*, by Kathleen Ann Ruane, which provides the basis for the legal analysis presented here.

[26] *Prometheus Radio Project v. FCC,* 373 F.3d 372 (2004).

restrictions on how actions can be structured to foster that goal.[27] In particular, the Supreme Court has declared that, to ensure that they satisfy the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, any government actions that employ race-based classifications are subject to strict scrutiny and may be upheld "only if they are narrowly tailored measures that further compelling governmental interests."[28]

With this in mind, when the FCC in 2008 adopted a number of rules, policies, programs, and guidelines intended to promote diversity of ownership, although it explicitly indicated its intent to foster minority and female ownership, it "decided to employ a race- and gender-neutral definition [of eligible entity] in the rules ... so as to avoid constitutional difficulties.... "[29] Specifically, it defined as eligible "any entity that would qualify as a small business consistent with the Small Business Administration (SBA) standard for its industry grouping, based on revenue."[30] But the court ruled the FCC's revenue-based eligibility definition arbitrary and capricious, finding that the Commission failed to demonstrate that measures based on that definition would enhance the stated goal of increasing broadcast ownership by minorities and women.[31] The court remanded those measures adopted in the FCC Diversity Order that use that eligibility definition and instructed the Commission to address the issue in its 2010 Quadrennial Review of its media ownership rules.[32]

In the current NPRM, the FCC does not propose a new definition of "eligible entity." Rather, it seeks input "on how the Commission most effectively can expand upon its diversity initiatives at the same time that we address the Third Circuit's concerns and other legal considerations, including potential impediments to affording licensing preferences to minorities and women under current standards of constitutional law."[33] It asks many questions about the options available for reconsideration of the eligible entity standard to use.[34]

At this time, the Commission is merely collecting information, and will postpone any decision on eligibility criteria until its 2014 quadrennial review. The FCC concluded:

> we believe that making legally sound proposals would not be possible based on the record before us at this time. Accordingly, we plan to undertake the following actions in preparation for the 2014 broadcast ownership review to establish with the requisite foundation and clarity what additional policies can be implemented promoting greater broadcast ownership diversity, including female and minority ownership: 1) Continue to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners, including women and minorities, in all services we license; 2) Commission appropriately-tailored research and analysis on diversity of ownership; and 3) Conduct workshops on the opportunities and challenges facing diverse populations in broadcast ownership. In addition, we ask interested parties to supplement the record and provide any

[27] *Adarand Construction v. Peña,* 515 U.S. 200, 227 (1995).

[28] *Adarand,* 515 U.S. at 227.

[29] *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking (Diversification Order), adopted December 18, 2007 and released March 5, 2008, at para. 9.

[30] Diversification Order at para. 6.

[31] *Prometheus II,* 652 F.3d at 470-471.

[32] *Prometheus II*, 652 F.3d at 472.

[33] NPRM at para. 149.

[34] NPRM at paras. 159-167.

and all data available that can complete a picture of the current state of ownership diversity, including minority and female ownership in the broadcast industry and to justify any prospective actions the Commission may take on remand.[35]

The Radio/Television Cross-Ownership Rule

Current Rule

Under the current Radio/Television Cross-Ownership rule:[36]

- An entity may own or control up to two television stations (provided it is permitted under the Local Television Ownership rule) *and* up to six radio stations (provided it is permitted under the Local Radio Ownership rule) in a local market where at least 20 independently owned media voices would remain post-merger.
- Where entities may own a combination of two television stations and six radio stations, an entity alternatively may own one television station and seven radio stations.
- An entity may own or control up to two television stations (provided it is permitted under the local television ownership rule) *and* up to four radio stations (provided it is permitted under the local radio ownership rule) in a local market where at least 10 independently owned media voices would remain post-merger.
- A combination of one television station and one radio station is allowed regardless of the number of independently owned voices remaining in the local market.
- For the purpose of applying this rule, independently owned voices include all independently owned and operating (i) full-power broadcast television stations, (ii) broadcast radio stations, (iii) newspapers that publish at least four times a week, and (iv) cable systems (which count as a single voice).

Proposed Rule Change

In the NPRM, the FCC tentatively concludes that the Radio/Television Cross-Ownership rule is no longer necessary to promote the public interest and therefore tentatively proposes that it be repealed.[37] The FCC does not expect that repeal would lead to significant media consolidation. But, according to the Commission, even if greater consolidation were to occur, data in the record suggest that radio/television cross-ownership does not negatively impact the amount or diversity of local news available to consumers. The FCC tentatively concludes that in the current media market, the goals of localism and diversity will be adequately protected by the Local Radio and Local Television Ownership rules without the additional cross-ownership limitation.

[35] NPRM at para. 158.

[36] 47 C.F.R. 73.3555(c).

[37] NPRM at para. 119.

Broadcasters support the proposed repeal of the Radio/Television Cross-Ownership rule, arguing that it does not foster localism, diversity of voices, or competition, and citing empirical evidence that in-market television-radio combinations provide scale economies that increase local news production.[38] The National Hispanic Media Coalition (NHMC), et al., a collection of organizations representing women, people of color, and people in rural areas on telecommunications policies, opposes repeal of the rule, claiming there is not sufficient evidence on the record about radio ownership by women and people of color and that "the Commission's conclusion runs contrary to NHMC et al.'s research in the Los Angeles and Rio Grande Valley [local markets]."[39] Most other commenters did not directly address this proposed rule.

Newspaper/Broadcast Cross-Ownership Rule

Current Rule

The Newspaper/Broadcast Cross-Ownership rule currently in effect[40] prohibits ownership or control of a daily newspaper *and*:

- a full power television stations whose Grade A service contour[41] encompasses the entire community in which the newspaper is published; *or*
- a full power AM radio station whose predicted or measured 2 millivolt per meter contour[42] encompasses the entire community in which the newspaper is published; *or*
- a full power FM radio station whose predicted 1 millivolt per meter contour[43] encompasses the entire community in which the newspaper is published.

A broadcaster can start a new daily newspaper in a local market in which it owns a television or radio station, but cannot combine with an existing newspaper.

Despite these prohibitions, a number of newspaper/broadcast combinations exist in local markets because when the FCC first adopted the cross-ownership prohibition in 1975 it grandfathered some pre-existing combinations and, in the past decade, the FCC first granted a number of

[38] NAB March 2012 Comments at p. 51.

[39] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Comments of National Hispanic Media Coalition (NHMC), Center for Rural Strategies, Center for Media Justice (NHMC March 2012 Comments), March 5, 2012, at pp. 35-36.

[40] 47 C.F.R. §73.3555(d).

[41] A Grade A service contour maps the geographic area that is predicted by an engineering model to receive a broadcast television signal at an intensity associated with good reception.

[42] A 2 millivolt per meter (or 2 mv/m) contour maps the geographic area that is predicted by an engineering model or measured to receive a radio signal of that intensity.

[43] A 1 millivolt per meter (or 1 mv/m) contour maps the geographic area that is predicted by an engineering model or measured to receive a radio signal of that intensity.

temporary waivers, and then in 2007 granted permanent waivers to five of those newspaper-broadcast station combinations.[44]

In 2007, the FCC adopted a rule that relaxed the newspaper/broadcast cross-ownership prohibition in the 20 largest local markets,[45] but the Third Circuit remanded the rule for procedural reasons, finding that the Commission had failed to comply with the notice and comment provisions of the Administrative Procedures Act.[46] The court did not address the Commission's substantive modifications to the rule.

Proposed Rule Change

In the NPRM, the FCC tentatively concludes that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity, but that a blanket prohibition on such combinations is overly broad and does not allow for certain cross-ownership combinations that might be in the public interest.[47] It tentatively concludes that the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information,[48] and that such cross-ownership can be accommodated in the largest markets, which have many media outlets, without unduly harming viewpoint diversity.[49]

The Commission therefore proposes a rule that incorporates the central provisions in the rule that it adopted in 2007 (but was remanded by the courts on procedural grounds) and updates that rule to reflect the broadcast television transition from analog to digital transmission.[50] The proposed rule would prohibit cross-ownership subject to an exception, as follows:

(1) It would prohibit ownership or control of a daily newspaper *and*:

- a full power television station whose community of license is in the same local market (referred to as a designated market area or DMA[51]) as the entire community in which the newspaper is published; *or*

[44] *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licenses,* MB Dockets No. 06-121, 02-277, and 04-228 and MM Dockets No. 01-235, 01-317, 00-244, and 99-360, Report and Order and Order on Reconsideration, adopted December 18, 2007 and released February 4, 2008 (2007 Order), at para. 77.

[45] 2007 Order at para. 13 and Appendix A, pp. 84-85.

[46] *Prometheus II*, 652 F. 3rd 437 (2011).

[47] NPRM at para. 89.

[48] NPRM at para. 89.

[49] NPRM at para. 90.

[50] For a discussion of the transition from analog to digital broadcast television transmission, see CRS Report RL34165, *The Transition to Digital Television: Is America Ready?*, by Lennard G. Kruger.

[51] DMAs are geographic designations developed by Nielsen Media Research. There are 210 DMAs in the United States. A DMA is made up of all the counties that get the preponderance of their broadcast programming from a given television market. The Nielsen DMAs are both complete (all counties in the United States are assigned to a DMA) and (continued...)

- a full power AM radio station whose predicted or measured 2 mV/m contour encompasses the entire community in which the newspaper is published; *or*
- a full power FM radio station whose predicted 1 mV/m contour encompasses the entire community in which the newspaper is published.

(2) There would be a presumption, however, that in the 20 largest DMAs such cross-ownership is consistent with the public interest so long as (a) at least eight independently owned and operating major media voices (full-power television broadcast stations and major newspapers) would remain in the DMA after the combination, and (b) if the proposed combination involves a television station, the television station is not ranked among the top four in terms of audience ratings.[52]

Under the currently proposed rule, proposed newspaper-broadcast combinations would be reviewed on a case-by-case basis without specific guidelines.[53] In contrast, the remanded 2007 rule was very complex, with every proposed newspaper-broadcast combination subject to a public interest determination that required multiple steps: there were two defined circumstances that would automatically reverse a negative presumption about a proposed combination and four factors that had to be considered to confirm or rebut a positive or negative public interest presumption about a proposed combination.[54]

Most commenters oppose the FCC proposal, either seeking elimination of the newspaper-broadcast cross-ownership rule in its entirety or seeking its retention in its entirety. The National Association of Broadcasters claims the newspaper/broadcast cross-ownership rule should be eliminated because it is unnecessary for competition or to promote viewpoint diversity, and harms localism by preventing efficiencies from newspaper-broadcast combinations that would yield more local news programming.[55] The United Church of Christ (UCC) opposes modification of the current rule because it would "facilitate further industry consolidation and reduce ownership opportunities for minorities and women."[56] Free Press, a non-profit media reform organization, supports the current rule because it "preserves news independence and ensures access to diverse and competing sources of local news, both off- and online."[57] The Diversity and Competition Supporters, a coalition of 50 national organizations created in 2002 to advance the cause of

(...continued)

exclusive (DMAs do not overlap). In the 1992 Cable Act, Congress amended the 1934 Communications Act to require, subject to certain exceptions, each cable system to carry the signals of all the local full power commercial television stations "within the same television market as the cable system," with that market determined by "commercial publications which delineate television markets based on viewing patterns." 47 U.S.C. §534. The DMAs represent the only nationwide commercial mapping of television audience viewing patterns. Each county in the United States is assigned to a television market based on the viewing habits of the residents of the county.

[52] It also is presumed that such cross-ownership is inconsistent with the public interest in markets smaller than the top 20 markets.

[53] NPRM at para. 103.

[54] For a detailed discussion of the remanded 2007 rule, see CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*, by Charles B. Goldfarb.

[55] NAB March 2012 Comments at pp. 39-49.

[56] UCC March 2012 Comments at p. 26.

[57] Free Press March 2012 Comments at p. 28.

minority ownership, states that the Newspaper-Broadcast Cross-Ownership rule has little impact on minority ownership, especially compared to the impact of the local television ownership rule.[58]

Local Television Ownership Rule

Current Rule

Under the current local television ownership rule, which is sometimes referred to as the "TV duopoly" rule, an entity may own or control two television stations in the same local market (DMA) only *if either*:

- the Grade B contours[59] of the stations do not overlap, *or*
- (a) at least one of the stations is not among the four highest-ranked stations in the DMA,[60] *and* (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination were consummated.[61]

The second criterion is sometimes referred to as the "top four ranked/eight voices test."

An existing licensee of a failed, failing, or unbuilt television station may seek a waiver of the rule.[62] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets the Local Television Ownership rule or the relevant (failed, failing, or unbuilt television station) waiver standard at the time of transfer.[63] In

[58] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rule Making (DCS March 2012 Comments), March 5, 2012, at p. 41.

[59] Grade B is a measure of signal intensity associated with acceptable reception when a television signal is being transmitted using analog technology. The FCC's rules define this contour, often a circle drawn around the transmitter site of a television station, in such a way that 50 percent of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90 per cent of the time. Although a station's predicted signal strength increases as one gets closer to the transmitter, there will still be some locations within the predicted Grade B contour that do not receive a signal of Grade B intensity.

[60] Defined as follows in 47 C.F.R. 73.3555(b)(1)(i): "At the time of application ... among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional accepted audience rating service."

[61] 47 C.F.R. 73.3555(b), adopted in *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules,* MM Docket Nos. 91-221 and 87-8, Report and Order (Local TV Ownership Report and Order), adopted August 5, 1999 and released August 6, 1999, at para. 8.

[62] A "failed" station is one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. Under the standard for "failing" stations, a waiver is presumed to be in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had all-day audience share of 4% or lower; (2) the financial condition of one of the merging stations is poor; (3) and the merger will produce public interest benefits. Under the standard for "unbuilt" stations, a waiver is presumed to be in the public interest if an applicant meets each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. (47 C.F.R. 73.3555, Note 7 (1) and Local TV Ownership Report and Order at para. 86.)

[63] Local TV Ownership Report and Order at paras. 77, 81, 86.

practice, once combinations have been formed through the waiver process, the FCC has allowed them to be transferred together even if they no longer meet the waiver standard.

Historically, the "top four ranked" stations in a local market have been, almost without exception, the local affiliates of the four major English language broadcast television networks—ABC, CBS, Fox, and NBC. This is no longer the case. In recent years, in local markets with large Hispanic communities, the local Univision affiliate sometimes is among the top four ranked stations. At the same time, market rankings can change dramatically from year to year, based on the success of a national network's programming. For example, for several years NBC network programming was not very popular relative to other major network programming, and thus some local NBC affiliates were no longer in the top four rankings in their markets, but this changed in 2012 when NBC broadcast more popular programming. Thus the combination of a local NBC affiliated station with another major network-affiliated local station that might have been allowed prior to 2012 might not have been allowed in 2012.

Proposed Rule Change

In the NPRM, the FCC tentatively concludes that the Local Television Ownership rule remains necessary to promote competition in local markets.[64] With the successful transition from analog to digital broadcast transmission, however, the first criterion, which is a measure of analog signal intensity, is no longer relevant. The FCC therefore proposes elimination of that criterion—while grandfathering any existing combinations that have been approved based on that criterion.[65]

The non-overlapping Grade B criterion typically has been applicable in those unusual instances in which a DMA is so large that two stations located within that DMA could be transmitting at their full power and still be sufficiently far away from one another that their signals did not overlap. In those instances, since there would be few if any households with acceptable over-the-air reception of the signals of both stations, allowing the two stations to have common ownership likely would have negligible impact on competition, localism, or diversity of voices.

It is possible that, with the elimination of the non-overlapping Grade B criterion, there could be two stations in a DMA whose signals would be received with acceptable over-the-air reception by few if any households in the DMA, but who would no longer qualify for dual ownership (because they could not meet the "top four ranked/eight voices test"). Thus the proposed rule change could result in the prohibition of some combinations that currently would be permitted. The FCC seeks comment on how frequently such situations arise and whether and how to accommodate such a situation, while tentatively concluding that it should grandfather such ownership combinations that already exist.[66]

[64] NPRM at para. 26.

[65] NPRM at paras. 36-39.

[66] NPRM at para. 39.

Request for Additional Public Comment on Waivers and on Multicasting

Some commenters raised concerns that prohibiting all television mergers in small markets could prevent competitively challenged broadcasters in those markets from realizing potential efficiencies that could be achieved through common ownership. The FCC therefore sought comment on whether allowing certain combinations in small markets, even between top-four stations, would promote additional local news.[67] For example, the FCC cited a staff analysis that suggests that markets with six or fewer stations may be less able to support four local television news operations and perhaps combinations in such markets would foster, not reduce, news programming.

With the completion of the digital television transition in June 2009, full-power television stations have the ability to use their available spectrum to broadcast not only their main program stream, but also, if they choose, additional program streams; this is known as multicasting. Some commenters state that this allows an individual licensee to broadcast multiple revenue-generating program streams without having to purchase an additional in-market station and even allows the licensee to affiliate with more than one national programming network in markets with fewer than four stations. Thus, they argue, stations do not need to resort to duopoly ownership to expand revenue opportunities that support local news programming.[68] But broadcasters argue that multicasting is not a substitute for duopoly ownership; they have had difficulty attracting popular programming for the multicast channels and cable and satellite operators are not obligated to carry those channels under the "must carry" rules.[69] Given these conflicting perspectives, the FCC seeks comment on whether multicasting replicates the potential benefits to station owners and viewers associated with owning a second in-market station (for example, efficiency gains and improved programming) and whether stations in small markets still need to own multiple stations—and perhaps even two top-four stations—to generate the revenues and exploit the cost efficiencies needed to provide local news programming.[70]

There were more comments—and more detailed comments—on the Local Television Ownership rule than on any of the other media ownership rules. The broadcasters propose that the rule be eliminated, claiming the rule is unnecessary to ensure competition and does not preserve localism or diversity and that allowing duopolies would strengthen the broadcasters' ability to serve their communities.[71] The NAB also opposes the minor rule change proposed by the FCC—to update the rule to take into account the digital transition by eliminating the condition that the stations have overlapping Grade B contours—as overly restrictive and not reflective of technical and marketplace realities.[72]

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[67] NPRM at para. 53.

[68] NPRM at para. 56.

[69] NPRM at para. 56. Under Section 534 of the Communications Act (enacted as part of the 1992 Cable Act), cable companies are required to carry the primary signals of local full-power commercial television stations, but this requirement does not extend to the carriage of non-primary multicast signals.

[70] NPRM at para. 57.

[71] See, for example, *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09-182 and 07-294, Comments of Nexstar Broadcasting, Inc. (Nexstar March 2012 Comments) at pp. 11-26.

[72] NAB March 2012 Comments at pp. 29-30.

Most other commenters either support the FCC proposal to retain the local ownership rule with a minor change to reflect the digital transition or propose that the local ownership rule be made more stringent. For example, MMTC supports retention of the duopoly rule, claiming "duopolies have threatened minority ownership because of the fact that lenders and investors are less willing to finance a standalone station when they can finance duopolies because of their more attractive revenue models" and because "local television duopolies decrease the local programming that is available to minority consumers."[73] Free Press prefers that the FCC return to a strict "one to a market rule" but would support retention of the current rule if the FCC addressed "the problem of 'covert consolidation' by local television stations" through the use of sharing agreements.[74] UCC claims that retaining the existing local television rule would negatively affect ownership opportunities for minorities and women and thus also prefers a strict one to a market rule.[75]

As will be explained in greater detail below, the debate about the local television ownership rule frequently is tied to in-market sharing agreements and how they are treated by the FCC's attribution rules.

Local Radio Ownership Rule

Current Rule

The local radio ownership limits currently in place are those that the FCC adopted in 1996 to codify the language in Section 202(b)(1) of the 1996 Telecommunications Act (though they now use a methodology for defining local radio markets that the Commission adopted in 2003). Specifically, the current rule provides that:

- in a radio market with 45 or more full power commercial and noncommercial radio stations, an entity may own, operate, or control up to eight commercial radio stations, not more than five of which are in the same service (AM or FM);
- in a radio market with between 30 and 44 (inclusive) full power commercial and noncommercial radio stations, an entity may own, operate, or control up to seven commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with between 15 and 29 (inclusive) full power commercial and noncommercial radio stations, an entity may own, operate, or control up to six commercial radio stations, not more than four of which are in the same service (AM or FM);
- in a radio market with 14 or fewer full power commercial and noncommercial radio stations, an entity may own, operate, or control up to five commercial radio stations, not more than three of which are in the same service (AM or FM),

[73] DCS March 2012 Comments at p. 40.

[74] Free Press March 2012 Comments at pp. 44-50.

[75] UCC March 2012 Comments at pp. 26-27.

> except that an entity may not own, operate, or control more than 50 percent of the stations in such market.[76]

These numerical limits are applied to geographic markets that are defined according to boundaries defined by Arbitron, a commercial audience measurement service. The Arbitron rating boundaries are based on market factors rather than on the signal transmission contours that previously were used to define markets.[77] Since Arbitron boundaries do not cover small radio markets, the FCC performed a rulemaking proceeding to determine how to define geographic markets in those small markets for which there are no Arbitron market definitions.[78]

Proposed Rule Change

In the NPRM, the FCC tentatively concludes that the current Local Radio Ownership rule remains necessary to promote competition and does not propose any changes to the rule.[79] It does seek comment, however, on whether to change the existing numerical limits and/or market tiers; on the impact of the ongoing digital radio transition on the differences between AM and FM stations; on whether to adopt a specific waiver standard; and on the impact of the Local Radio Ownership rule on minority and female ownership.[80]

The NAB proposes elimination of the radio ownership rule, claiming that competition in the audio market from internet radio, satellite radio, and mobile devices render the rule obsolete and that the localism and diversity are impeded by the rule.[81] UCC claims that retention of the current rule would negatively affect ownership opportunities for minorities and women and proposes that the radio ownership rule be tightened, with entities that could not meet the new requirements forced to divest within a reasonable period of time, thereby making stations available to women and minorities.[82]

Dual Network Rule

Current Rule

The Dual Network rule permits common ownership of multiple broadcast television networks, but prohibits a merger among ABC, CBS, FOX, and NBC,[83] which historically have been the major national networks. In 2001, as part of an earlier review of its broadcast media ownership rules, the FCC modified the rule to allow those four major networks to own, operate, maintain, or control broadcast networks other than the four majors. With this change, Viacom, then owner of

[76] Section 202(b) also provides that the Commission may permit a party to exceed these limits "if the Commission determines that [it] will result in an increase in the number of radio broadcast stations in operation." 1996 Act, §202(b)(2), 110 Stat. at 10-11.

[77] 2003 Order at para. 239.

[78] 2003 Order at para. 239.

[79] NPRM at para. 61.

[80] NRPM at para. 62.

[81] NAB March 2012 Comments at pp. 32-38.

[82] UCC March 2012 Comments at pp. 27-29.

[83] 47 C.F.R. 73.658(g).

CBS, was allowed to purchase UPN, and NBC was able to purchase Telemundo, the second-largest Spanish-language television network in the United States.

Proposed Rule Change

In the NPRM, the FCC tentatively finds "that the top four broadcast networks continue to possess characteristics that distinguish them from other broadcast and cable networks and therefore still serve a unique role in the electronic media that justifies retaining a rule specific to them."[84] It tentatively concludes that "a top-four network merger would restrict the availability, price, and quality of primetime entertainment programming to the detriment of consumers ... and would substantially lessen competition for advertising dollars in the national advertising market."[85] It therefore tentatively concludes that the dual network rule should be retained as is.

Few, if any, parties commented on the Dual Network rule.

Sharing Agreements and Attribution Rules

The FCC's attribution rules identify criteria for determining when an entity holds sufficient ownership or control of a broadcast station that such ownership or control should be attributed to the entity for the purposes of applying the multiple ownership rules.[86] According to the FCC order in which the rules were adopted, the attribution rules "seek to identify those interests in or relationships to licensees that confer a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[87]

Most significantly, under the current Local Television Ownership rule, also known as the duopoly rule, an entity may own *or control* two television stations in the same local market only if at least one of the stations is not ranked among the four highest-ranked stations in the market *and* at least eight independently owned and operating commercial or non-commercial full-power stations would remain in the market after the proposed combination was consummated. In practice, this rule applies primarily to small markets, since larger markets are likely to have more than eight independent stations. If certain sharing agreements between two stations in a market are deemed, by the FCC's attribution rules, to give one station control over the other, then that may result in the controlling station being out of compliance with the duopoly rule.

Currently, the only sharing agreement-related attribution rule for television stations covers local marketing agreements (LMAs) in which one station both purchases blocks of time from another station in the same market and sells the advertising for the purchased time—that is, the broker station provides both the programming and the advertising—for at least 15% of the brokered station's broadcasting time.[88] The FCC has enforced this as a bright-line rule with a clearly defined standard that leaves little or no room for varying interpretation and produces predictable

[84] NPRM at para. 137.

[85] NPRM at para. 137.

[86] 47 C.F.R. 73.3555 Note 2.

[87] 1999 Attribution Order at para. 1.

[88] 47 C.F.R. 73.3555 Note 2j(2).

and consistent results in its application. As long as (1) the block of time covered by an agreement does not exceed 15% of the brokered station's programming time, and (2) the agreement contains a certification and perhaps other language indicating that the licensee of the brokered station maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel, and programming, the agreement will not trigger the attribution rule.[89] (The second criterion reflects note 2j(3) to the Commission's attribution rule.[90])

In their comments, most broadcasters note approvingly that the FCC has placed very few restrictions on broadcast sharing arrangements and urge the FCC "to continue to provide broadcasters with flexibility to structure management and shared services agreements, joint sales agreements, and other innovative cost-sharing arrangements between same-market stations."[91] According to Nexstar Broadcasting:

> Although duopolies provide stations with the greatest level of efficiencies (providing the greatest benefit to revenue-challenged medium and small market stations), because the current Local TV Ownership Rule prohibits duopolies in those markets most in need of such ownership relief, many of these stations have entered into Local Service Agreements. Nexstar's LSAs allow the stations to produce and broadcast more local news and other local programming; allow the stations to invest in significant capital expenditures for Doppler weather radar, satellite trucks and high definition news equipment; allow the stations to be more active community participants; and provide public service organizations with an expanded platform to promote their causes with the community. Without these LSAs, both stations would be significantly impacted, with one station losing the ability to produce local programming without the expenditure of resources that simply are not available in these small markets.[92]

The broadcaster position is succinctly expressed by the National Association of Broadcasters (NAB):

> ... consumers benefit when stations have flexibility to cooperate and share resources with other local media outlets, whether through duopolies, LMAs, joint sales agreements or shared services agreements. Indeed, these types of arrangements help make it possible for local stations to continue providing extensive and expensive local news programming and emergency journalism, despite facing significant economic challenges.[93]

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[89] See, for example, Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, Federal Communications Commission, to Malara Broadcast Group of Duluth Licensee LLC, Re: Application for Assignment of License of KDLH-TC, Duluth, Minnesota (Facility ID # 4691), File No. BALCT-20040504ABU, DA 04-3908, released December 14, 2004.

[90] 47 C.F.R. 73.3555 Note 2j(3) states "Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming.... "

[91] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act,* MB Docket No. 09-182, Comments of Gray Television, Inc. on the FCC's May 25, 2010 Notice of Inquiry (Gray June 2010 Comments), June 12, 2010, at p. 13.

[92] Nexstar March 2012 Comments at p. vi.

[93] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, Comments of the National Association of Broadcasters (NAB July 2010 Comments), July 12, 2010, at p. 84.

NAB argues that "sharing arrangements do not provide the opportunity to exert significant influence over another licensee's programming or core operating functions" because they typically limit the amount of provided programming to no more than 15% of the licensee's weekly schedule, the threshold level in the FCC's attribution rules.[94] Moreover, NAB claims that the sharing agreements typically are structured to specify a flat fee to be paid by the licensee in exchange for services, which creates a financial structure that ensures that the licensee retains economic incentives to control the station.[95] For these reasons, most broadcasters oppose any expansion of the current attribution rules relating to sharing arrangements.

Other commenters in the FCC's media ownership proceeding, and also in the Commission's future of media proceeding,[96] however, raise two general areas of concern about the attribution rules relating to sharing agreements that they want the Commission to address.

- Some parties express concern that stations have entered into sharing arrangements involving news gathering and news programming that are not covered by current attribution rules but that may harm localism, diversity of voices, and competition and thus merit careful FCC review and analysis.[97] They want the Commission to collect and analyze data on all types of sharing arrangements, to require stations to include all sharing agreements (not just those currently subject to the attribution rule) in their public files, and to expand attribution rules to cover a broader range of sharing arrangements. The United Church of Christ proposes a bright line, multifactor test, which is much stricter than the current attribution rule, to attribute ownership where one station exercises substantial influence over another station in the market as a result of a sharing agreement.[98]
- Some parties claim that the FCC has adopted attribution criteria, permitted waivers and exceptions to its media ownership and attribution rules, or interpreted and enforced those rules in a fashion that has resulted in many instances of two top-four stations in a local market participating in sharing arrangements in which one of the licensees effectively cedes control of its station to the other licensee.[99] They claim this has resulted in wide-scale violation of the Local Television Ownership rule and seek stricter enforcement of existing ownership and attribution rules.

[94] NAB March 2012 Comments at pp. 64-65.

[95] NAB March 2012 Comments at p. 66.

[96] "FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age; Comment Sought," GN Docket No. 10-25, DA 10-100, released January 21, 2010, hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-100A1.pdf.

[97] See, for example, UCC November 2009 Comments at pp. 4-6, and *In the Matter of FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age,* GN Docket No. 10-25, Comments of Communications Workers of America and Media Council Hawai'i (CWA Future of Media Comments), May 7, 2010, at pp. 9-17.

[98] UCC March 2012 Comments at pp. 15-20.

[99] See, for example, UCC November 2009 Comments, at pp. 12-14, and *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, American Cable Association Comments (ACA July 2010 Comments), July 12, 2010, Appendix A ("57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market") and Appendix B (William P. Rogerson, "Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effect on Retransmission Consent Fees," May 18, 2010, at pp. 5-7).

Sharing Agreements Involving the Production of News Programming

Currently, the only sharing agreement-related attribution rule for television stations narrowly addresses local marketing agreements in which one station both purchases blocks of time from another station in the same market and sells the advertising for the purchased time—that is, the broker station provides both the programming and the advertising—for at least 15% of the brokered station's broadcasting time.[100] When the FCC adopted the rule in 1999,[101] it had identified 74 LMAs in which the brokering and brokered stations were located in the same market and, for these, on average the LMA covered more than 90% of the brokered station's broadcasting time.[102] From that perspective, the 15% threshold in the rule, which was a carryover from the pre-existing radio rule, did not appear to provide a constraint on any station decision to participate in an agreement. One commenter, Paxson Communications, which owned independent television stations and its own small programming network, argued that control of a television station should not be attributed based on the same standard as radio because radio stations (at that time) generally were programmed entirely on a local basis (that is less the case today), while most television stations relied (and still rely) heavily on national network and syndicated programming. To more closely parallel the radio LMA attribution rule, Paxson proposed that any television attribution rule be based on the amount of locally produced programming provided by the broker station.[103]

According to Bob Pepper, who is the primary researcher and author of an annual Radio and Television Digital News Association (RTDNA) survey of broadcast station news directors that is widely recognized in the industry, just under half the non-PBS broadcast television stations in the United States produce and air original local news programming and an additional 14% broadcast local news programming produced by another station. According to the most recent *RTDNA/Hofstra Survey*,[104] those stations that produce their own local news programming aired an average of 5.3 hours of news programming on weekdays and 1.7 hours on Saturdays and Sundays. If stations are broadcasting 24/7, this would represent 17.8% of their broadcasting time. The amount of local news programming broadcast by stations that do not produce their own programming is, of course, on average much lower, with more than 600 stations not airing any local news programming at all. Thus, for most broadcast television stations, if another station in their market were to produce all of their local news programming, such programming would not reach the 15% threshold in the current attribution rule.

Although three-quarters of the news directors participating in the *RTDNA/Hofstra Survey* were "not sure" of the percentage of their station revenues generated by news, the one-quarter that did know reported that news generated a substantial portion of station revenues—the average figure reported was 46.8%, the median figure 45%.[105] The survey does not indicate whether this

[100] 47 C.F.R. 73.3555 Note 2j.

[101] 1999 Attribution Order at paras. 66-99.

[102] 1999 Attribution Order at paras. 74 and 75.

[103] 1999 Attribution Order at para. 78 and footnote 173.

[104] *RTDNA 2011 TV and Radio News Staffing and Profitability Survey* (RTDNA 2011 Survey), "Part II: Record Amount of Local News Produced on TV," unpaginated, http://www.rtdna.org/pages/media_items/2011-tv-and-radio-news-staffing-and-profitability-survey2033.php?id=2033.

[105] RTDNA 2011 Survey, "Part I: More Jobs, Higher Profits in TV News," unpaginated.

includes revenues received by stations for producing news programming for other stations, and if it does this figure may overstate the financial importance of news programming to a typical station, but given that the local station gets to keep all the advertising revenues generated during the time slots for which it produces it own programming rather than relying on network or syndicated programming, it would appear that for many if not most stations the approximately 15% of total programming time taken up by news is financially significant. An entity that provides that slot of programming for another station may attain a degree of influence or control such that it has a "realistic potential to affect the programming decisions of licensees or other core operating functions."

In recent years, many broadcast television stations have entered into sharing arrangements with other stations in their market for the production of news programming, sometimes with an additional arrangement for joint advertising. In its comments in the FCC's future of media proceeding,[106] the Communications Workers of America (CWA) identified agreements in at least 42 different markets. It identified three types of agreements: (1) shared service agreements (SSAs) in which one broadcast licensee has the contractual right to produce programming and operate the station of another licensee, in return for consideration; (2) joint sales agreements (JSAs) in which one broadcast licensee (the broker) is allowed to sell the advertising time for another station (the brokered station), typically in exchange for a percentage of the advertising revenues, though sometimes the brokered station pays the broker a commission and the brokered station retains the advertising revenues; and (3) local news service (LNS) arrangements in which two or more stations in a local market share news gathering resources and share the footage among the participating broadcasters. According to its submission:

- In 19 markets, two or more stations participated in local news service arrangements; in one of these markets, two (of the three) participants in the LNS also had a shared service agreement and in two of the markets, the participants also had joint sales agreements. Most LNS arrangements are in large markets (markets ranked 1-5, 7-9, 11-13, 17, 32, 37, 49, 71, and 116). In three of these, five stations participated; in six of the markets, the local stations affiliated with three (or all four) of the four major national broadcast networks participated.
- In 26 markets, two or more stations were parties to shared service agreements. In four of these markets, the stations also had joint sales agreements and in one the participants, along with a third station, had a local news service arrangement. Most SSAs are in mid-size and smaller (but not the smallest) markets—six are in markets ranked from 18 to 50, 11 in markets ranked from 51-100, and nine in markets ranked from 101-139.

CWA did not have access to the contracts to provide details,[107] but it alleges that all SSAs include LMAs and therefore the only thing currently keeping them from being subject to the Commission's attribution rule is the 15% threshold level in the rule.[108] It therefore proposes that

[106] CWA Future of Media Comments at p. 2 and appendix.

[107] Under the current rule, only those LMAs that meet the 15% threshold have to be placed in the station's public file and filed with the FCC; thus there is no public information on other sharing arrangements.

[108] *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; RFQ for Media Ownership Studies,* MB Docket Nos. 09-192 and 09-182, Comments of Communications Workers of America, The Newspaper Guild/CWA, National Association of Broadcast Employees and Technicians/CWA (CWA July 2010 Comments), July 12, 2010, at p. 32.

the Commission lower that threshold level. It claims that such a rule would not keep a top-four station in a large market from providing some news programming to a small independent station, but would prohibit two top-four stations from reducing the number of voices in a market by combining and simulcasting their local news operations.[109]

UCC proposes that the FCC collect data on broadcast joint ventures and their effect on localism, competition, and diversity.[110] CWA wants the FCC to require copies of LNS agreements and other sharing agreements be placed in a station's public file and to require that any contribution by an LNS to a report be credited on-air so viewers know the source of their news.[111]

UCC also proposes that the FCC adopt a bright line, multifactor test, which would be far more restrictive than the current bright line rule, to attribute ownership where one station exercises substantial influence over another station in the same market as a result of a sharing agreement.[112] Under its test, the "serving broadcaster" that provides services under a sharing agreement would be attributed with ownership of another license-holding station that receives services (the "licensee") under the sharing arrangement if *any* of the following circumstances exists:

- the servicing broadcaster provides all or substantially all local news programming for the licensee's station;
- the servicing broadcaster sells 15% or more of the licensee's weekly advertising time;
- the stations share management personnel;
- the licensee station maintains no separate facilities;
- the serving broadcaster reports to the Securities and Exchange Commission that the servicing broadcaster owns or operates the licensee's station;
- 50% or more of the licensee's total revenues go to the servicing broadcaster; or
- the licensee outsources its retransmission consent negotiations to the serving broadcaster.

UCC further proposes that the FCC assign attribution in situations where none of these seven bright line tests are met, but where a combination of three or more of a list of factors demonstrate "substantial influence when combined with other factors."[113]

Most broadcasters strongly oppose any restrictions on sharing arrangements for news production, claiming that these agreements facilitate greater collaboration between media outlets and permit stations to sustain labor intensive journalism, thereby offering communities greater access to local news content that could otherwise be achieved.[114] They cite many examples of sharing arrangements that result in expanded local news programming that benefit the public but fail such bright line tests.

[109] CWA July 2010 Comments at p. 32.

[110] UCC November 2009 Comments at pp. 4-6.

[111] CWA July 2010 Comments at pp. 33-35.

[112] UCC March 2012 Comments at pp. 15-20.

[113] UCC March 2012 Comments at pp. 19-20.

[114] See, for example, Gray June 2010 Comments at p. 14.

None of the studies sponsored by the FCC address these sharing agreements and thus the FCC does not currently have empirical evidence to evaluate the conflicting claims. In the NPRM, it seeks such evidence.[115]

The American Cable Association (ACA) claims that when stations participating in an SSA or LMA jointly negotiate retransmission consent terms with the local cable operator, those stations have undue market leverage—especially if both stations are affiliated with one of the four major national networks—and are able to charge higher rates than others broadcast stations, thus raising cable costs and rates.[116] It proposes that the FCC "deem all forms of agreements that permit one television station to provide another with formal authority to negotiate retransmission consent on its behalf attributable."[117]

The FCC's Attribution Criteria and "Virtual Duopolies"

Over the past decade, the FCC appears to have quietly accepted the use of SSAs, even where the agreements give a single entity the responsibility to perform core functions for two or more top-four stations in a local market. The Commission has delegated to its Media Bureau the authority to review and rule on sharing agreements; decisions are made without a vote by the five FCC commissioners. Media Bureau decisions in one case set precedent for future cases.[118]

The Media Bureau has not constructed written guidelines, but in reaching its decisions it appears to have chosen a narrow interpretation of the language in the two relevant provisions in the attribution rules: (1) the block of programming time covered by an agreement must not exceed 15% of the brokered station's programming time, and (2) focus must be on whether the brokered station retains "ultimate control" over its programming decisions and policies, even if it has ceded certain core day-to-day functions to the broker station, and thus greater weight must be given to certifications made by the brokered station in its sharing agreements that it controls station programming, finances, and personnel than to evidence provided by outside parties.[119] In practice, the Media Bureau generally has deemed evidence provided by outside parties immaterial,[120] effectively limiting evidence to that provided to it by the parties to the agreement.

In the absence of Media Bureau guidelines, Steve Lovelady, a communications attorney who advises broadcasters, recently posted a blog that lays out "the allowable parameters for SSAs and JSAs [that] have been disclosed during private conversation with the FCC's staff when they are evaluating a proposed SSA/JSA arrangement and in the context of an assignment of FCC licenses

[115] NPRM at paras. 204-208.

[116] ACA July 2010 Comments at p. 2.

[117] ACA March 2012 Comments at p. 3.

[118] See, for example, Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, Federal Communications Commission, to Piedmont Television of Springfield License LLC, et al., Re: KSPR(TV), Springfield, Missouri, Application for Assignment of License, File No. BALCT-20061005ADY, ID No. 35630, DA 07-3746, released July 30, 2007, citing its decision in an earlier case.

[119] See, for example, Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, Federal Communications Commission, to Malara Broadcast Group of Duluth Licensee LLC, et al. (Media Bureau Letter to Malara), Re: Application for Assignment of License of KDLH-TC, Duluth, Minnesota (Facility ID # 4691), File No. BALCT-20040504ABU, DA 04-3908, released December 14, 2004.

[120] See, for example, Media Bureau Letter to Malara, at footnote 12, which states that "we view as immaterial to our resolution of this case statements allegedly made by Granite in an SEC filing."

from one party to another."[121] According to Lovelady, these "boundaries have not been generally publicized," often "aren't written down anywhere," and "can change from one day to the next and from one deal to the next," but cover the three basic elements of programming, financing, and personnel, as follows:

- To demonstrate control over programming, (1) the total amount of all provided news programming must be below the 15% threshold; (2) any network affiliation agreement for entertainment programming must be directly between the brokered station and the network, and the broker station may not negotiate network affiliation or syndicated programming agreements on behalf of the brokered station; and (3) the brokered station must have the right to reject any advertising sold by the broker station for broadcast on the brokered station.
- To demonstrate control over finances, (1) the value of the assets owned or controlled by the brokered station must be at least 20% of the total value of the station's assets, and thus the broker station cannot own or control more than 80% of the asset value of the brokered station; (2) direct loans to the broker station from the brokered station must not exceed 33% of the combined equity and debt of the brokered station, though the broker station may guarantee lease payments and loans made to the brokered station by banks and other unrelated financing sources; and (3) no more than 30% of the revenue collected by the broker station from the sale of advertising on the brokered station may be retained by the broker station, though the brokered firm may receive additional revenue from the brokered station for performing additional services.
- To demonstrate control over personnel, the brokered station (1) must retain at least two full-time employees on its payroll, one of whom must be a manager with full editorial discretion in carrying out the brokered station's policies, and (2) must be able to hire and fire its employees and pay their salaries without interference from the broker station.
- The broker station may have an option to acquire the brokered station so long as the option price is neither a fixed amount nor an amount that decreases during the life of the option if the station does well and cash flow is higher than predicted.
- The agreement cannot exceed eight years, which is the length of a broadcast television license, but need not coincide with the time period covered by the brokered station's license.

Several of these criteria are found in FCC rules that apply to all broadcast stations, not just to those stations that are party to sharing agreements,[122] but others do not appear to have been developed through a formal rulemaking proceeding with public comment, and even the 15% threshold was initially created for radio and then applied to television. The specific criteria

[121] Steve Lovelady, "SSAs and JSAs—Some Unwritten Rules," *CommLawBlog,* Fletcher, Heald & Hildreth, March 26, 2012, http://www.commlawblog.com/2012/03/articles/broadcast/ssas-and-jsas-some-unwritten-rules/print.html.

[122] For example, under 47 C.F.R. 73.3555 Note 2i(1)(A), an entity would have an attributable interest in a station if its equity and debt interests, in the aggregate, exceed 33% of the total asset value, defined as the aggregate of all equity plus all debt, of the station, whether or not the entity was in a sharing agreement with the station. Similarly, the FCC main studio rule requires all broadcast television and radio stations to maintain a main studio staffed by two full time employees, one of whom must be supervisory or managerial. (See Gregg P. Skall, "Main Studio Rule and Staffing," Womble, Carlyle, Sandridge & Rice, http://www.wcsr.com/resources/pdfs/telecommuncationmemos1328.pdf.)

employed may have little practical impact, in any case, if the Media Bureau relies primarily on licensee self-certification of ultimate control and considers evidence provided by outside parties immaterial.

The Commission appears to support the Media Bureau's process. It has not taken action on applications for review (dating back to January 2005) of several specific Media Bureau decisions, filed by other stations that allege the agreements give the broker station control over the brokered station and are anti-competitive and not in the public interest.[123] Several commenters now explicitly call on the FCC to grant those applications for review.[124]

The ACA submitted a list of 57 instances of multiple top-four affiliates in the same local market operating under some sort of sharing agreement, which it equated with common control of the stations.[125] It acknowledged that it did not know the terms of the sharing agreements, which in almost all cases were not publicly disclosed. Most of the identified sharing agreements were in smaller markets where common control would not be allowed under the ownership rule, but ACA did not have information needed to demonstrate which, if any, of the sharing agreements met the 15% brokered programming threshold or other requirements of the Local Marketing Agreement attribution rule. Nor do there appear to be other sources of publicly available data to fully address such questions of fact.[126]

Given the duopoly rule restriction on joint ownership in small markets, station owners who seek to exploit economies of scale in program production and to strengthen their negotiating position with advertisers and multichannel video programming distributors (MVPDs, such as cable and satellite television operators) may have the incentive to pursue sharing agreements with other stations in their market if such an agreement would not trigger an attribution rule or if the FCC chose not to enforce the attribution rule as strictly as it does direct ownership restrictions. This incentive could be particularly strong if the FCC has a history of grandfathering arrangements once it has initially allowed them to be implemented. This appears to be the situation prevailing today. The industry commonly refers to sharing arrangements in which one station effectively controls a second station as a "virtual duopoly." For example, Harry A. Jessell, editor and co-publisher of *TVNewsCheck,* who frequently comments on public policy issues from the perspective of the broadcasting industry, wrote in December 2011:

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[123] See, for example, *In re Application of Piedmont Television of Springfield License LLC (Assignor) and Perkin Media, LLC (assignee) For Consent to the Voluntary Assignment of the License for Station KSPR(TV), Springfield, MO,* File No. BALCT-20061005ADY, Facility ID No. 35630, Application for Review, Koplar Communications International, Inc., August 29, 2007, and UCC November 2009 Comments at pp. 13-14.

[124] See, for example, CWA July 2010 Comments at p. 33 and UCC November 2009 Comments at p. 14.

[125] ACA July 2010 Comments at p. 9 and Appendix A, table entitled "57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market."

[126] For example, ACA identifies 17 markets—ranked, by size, numbers 54, 74, 80, 100, 116, 131, 134, 138, 143, 146, 147, 149, 152, 165, 169, 170, and 198—in which Nexstar Broadcasting was the controlling entity in a sharing arrangement. Nexstar, itself, identifies 23 markets in which it owns and operates a station and has entered into a Management Service Agreement (MSA) to provide services to another station in the market owned and operated by an independent third party. (See http://www.nexstar.tv/index.php?option=com_content&view=article&id=301&Itemid=2.) Nexstar provides a brief description of the services it offers in each market. In the smallest of these markets, it has entered into both a joint sales agreement and shared service agreements in San Angelo, TX, Utica, NY, Abilene, TX, and Terre Haute, IN. It initiated a newscast for its partner in Terre Haute. It provides non-programming services in Billings, MT, but neither station offers local news programming. Nexstar does not provide information on the percentage of programming that it provides to its partners, however, so it is not possible to determine if control should be attributed in these small markets.

> Broadcasters in small markets interested in doubling up through shared services agreements and the like, had better act fast. The FCC will soon launch a rulemaking to determine whether such arrangements, which essentially allow the broadcasters to circumvent the ban against actual ownership of two stations in small markets, are still a good idea. And the rulemaking could very well lead to a prohibition against the so-called virtual duopolies.... As the "could" in the proceeding sentence suggests, nothing is for sure.... One thing broadcasters can count on the FCC not doing is ordering the dismantling of any existing arrangements. By its silence over the years, it has tacitly approved them. It isn't going to go back now and declare them illegal. It simply isn't in the FCC's nature to undo deals once done. I can't recall a single case, at least not in the broadcast side of FCC world. So, again, an NBC affiliate who is thinking it would be a good idea to cut a deal with the CBS affiliate and run the stations in tandem should make it a New Year's resolution to do it soon. The only guarantee, I think, is that deals done prior to a final order next year would be grandfathered in.[127]

This statement is a bit ambiguous. It might be interpreted as a warning that the FCC may take future action that would make attributable certain sharing arrangements that currently do not represent attributable control of another station. Or it might suggest that the FCC currently is allowing stations to participate in certain sharing agreements that meet the criteria in the current attribution rule and thus strictly speaking are in violation of the duopoly rule, but might not continue to look the other way in the future for new sharing agreements. Since stations have a disincentive to be subject to the attribution rule and, in any case, local programming frequently comprises less than 15% of a station's total programming, it is likely that for the vast majority of these sharing arrangements the amount of programming and advertising sales performed by the broker station is below the 15% threshold level in the FCC's attribution rule.

It may be instructive to note how one of the companies that has been an active participant in such arrangements describes its business operations.[128] Mission Broadcasting owns television stations in 14 markets and Nexstar Broadcasting also owns television stations in each of those markets. Mission has sharing agreements with Nexstar for each of its television stations. According to Mission's 2011 10-K submission to the Securities and Exchange Commission,[129] as of December 31, 2010:

- Mission owned and operated 16 broadcast television stations in 14 medium and small markets (ranked between 54 and 196 out of 210 DMAs) and had a total of 33 employees, all of which were full-time. In the two markets where it owned and operated two stations, one of the stations was a low-power station.
- Each of the stations was affiliated with a national network with the right to broadcast all programs transmitted by the network with which it is affiliated. Thirteen of those affiliations are with Top-Four networks (ABC, CBS, Fox, or NBC). The network had the right to sell a substantial majority of the advertising

[127] Harry A. Jessell, "Now's The Time To Make Virtual Duopolies," *TVNewsCheck,* December 9, 2011, http://www.tvnewscheck.com/article/2011/12/09/55959/nows-the-time-to-make-virtual-duopolies.

[128] CRS has selected this example because it exemplifies how the FCC addresses attribution when a licensee has participated in sharing agreements and also has made publicly available in its submissions to the Securities and Exchange Commission substantial information on station finances, personnel, and programming. CRS has no opinion and makes no judgment about the company's activities or FCC's actions.

[129] *Mission Broadcasting, Inc. Form 10-K*, United States Securities and Exchange Commission, March 16, 2011, Commission File Number 333-62916-02, at various pages.

time during these broadcasts. (Some of the stations received some compensation from the network based on the hours of network programming they broadcast.)

- Mission had a time brokerage agreement (TBA) for two of its stations that allowed Nexstar to program most of the stations' (non-network) broadcast time, sell the stations' (non-network) advertising time, and retain the advertising revenue generated in exchange for monthly payments to Mission.
- Mission had both a shared services agreement (SSA) and a joint sales agreement (JSA) with Nexstar for each of its 14 other stations. The SSA allowed the sharing of services including news production, technical maintenance, and security, in exchange for Nexstar's right to receive certain payments from Mission. The JSAs permitted Nexstar to sell and retain a percentage of the net revenue from the station's advertising time in return for monthly payments to Mission of the remaining percentage of net revenues. The SSAs and JSAs generally had ten year terms.
- Due to the TBAs, SSAs, and JSAs, Nexstar received substantially all the cash, after debt service costs, generated by Mission's stations. Mission anticipated that Nexstar will continue to receive substantially all of Mission's available cash.
- Nexstar guaranteed all obligations incurred under Mission's senior secured credit facility. Also, Mission was a guarantor of the senior secured credit facility entered into by Nexstar and the senior subordinated notes issued by Nexstar. If Nexstar, which was highly leveraged with debt, became unable to meet its obligations under the indentures governing its senior subordinated notes or its senior secured credit facility agreement, Mission could have been held liable for those obligations under guarantees.
- In consideration of Nexstar's guarantee of Mission's senior secured credit facility, Mission's sole shareholder had granted Nexstar purchase options to acquire the assets and assume the liabilities of each Mission television station, subject to FCC consent, for consideration equal to the greater of (1) seven times the station's cash flow less the amount of its indebtedness, or (2) the amount of its indebtedness. These option agreements (which expire on various dates between 2011 and 2018) were freely exercisable or assignable by Nexstar without consent or approval by Mission's sole shareholder. Mission expected these option agreements to be renewed upon expiration.
- The operating revenue of the Mission stations was derived primarily from broadcast advertising revenue sold and collected by Nexstar and paid to Mission under the JSAs. Mission's primary operating expense consisted of fixed monthly SSA fees paid to Nexstar for news production and technical and other services.
- Mission had net losses of $4.6 million, $2.6 million, and $7.5 million, respectively, for the years ended December 31, 2010, 2009, and 2008. Mission stated it may not be able to achieve or maintain profitability.
- Mission stated that its ability to continue as a going concern is dependent on Nexstar's pledge to continue the local services agreements.

For its part, Nexstar stated in its 2011 10-K submission,[130]

> We do not own Mission or Mission's television stations. However, as a result of (a) local service agreements Nexstar has with the Mission stations, (b) Nexstar's guarantee of the obligations incurred under Mission's senior secured credit facility, (c) Nexstar having power over significant activities affecting Mission's economic performance, including budgeting for Mission's advertising revenues, advertising and hiring and firing of sales force personnel and (d) purchase options (which expire on various dates between 2011 and 2018) granted by Mission's sole shareholder which permit Nexstar to acquire assets and assume the liabilities of each Mission station, subject to Federal Communications Commission ("FCC") consent, we are deemed under U.S. GAAP to have a controlling financial interest in Mission while complying with the FCC's rules regarding ownership limits in television markets. The purchase options are freely exercisable or assignable by Nexstar without consent or approval by Mission's sole shareholder. In compliance with FCC regulations for both us and Mission, Mission maintains complete responsibility for and control over programming, finances, and personnel for its stations.

With only 33 employees serving 16 television stations in 14 different markets, Mission does not have the staffing required to produce any of its own local programming and is dependent on Nexstar for its local (news or other) programming.[131] Given the mutual guarantees they provide of the other's financial obligations, the two are financially entwined as well. It appears likely that Nexstar meets the standard enunciated in the FCC attribution order, but not in the attribution rule: it has "a realistic potential to affect the programming decisions of [Mission] or other core operating functions." In a recent article, Mr. Jessell of *TVNewsCheck* referred to Mission as a "shell" company set up by Nexstar.[132] However, the Nexstar-Mission agreements meet the criteria for not triggering an attribution finding. Each explicitly covers less than 15% of the Mission stations' programming time and each includes a certification that Mission retains ultimate control over station finances, personnel, and programming. According to Media Bureau precedents, the information about the two companies' relationships contained in their SEC filings is immaterial in determining whether Nexstar exercises control over Mission.

By relying on a 15% programming threshold bright line rule and giving great weight to certification language in the agreements, the FCC's attribution rule process avoids the potential complexities of evidence-intensive determinations of control. Erwin G. Krasnow, a communications attorney who advises broadcasters, advised in a recent article in *Radio & Television Business Report*[133] that, for a station seeking FCC approval of a local marketing agreement or time brokerage agreements, there be in the LMA:

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[130] *Nexstar Broadcasting Group Inc. Form 10-K*, United States Securities and Exchange Commission, March 16, 2011.

[131] As explained earlier, the FCC main studio rule requires a station to maintain a main studio staffed by two full time employees, one of whom must be supervisory or managerial. Thus the FCC rules require Mission to have at least 32 employees, two for each station.

[132] Reporting on the UCC and ACA (and other) proposals for the FCC to adopt much more stringent attribution rules, which he characterized as an "assault on broadcasters' virtual duopolies," Mr. Jessell began as follows: "The FCC's duopoly rules prohibit one broadcaster from owning two stations in markets with fewer than eight total stations or two top-four stations (in most cases the Big Four affiliates) in markets of any size. But over the years, many broadcasters have gotten around the rules through shared service agreements and other contractual arrangements that stop short of ownership, but allow them to operate two or even three stations in a market. Station groups like Sinclair and Nexstar have gone so far as to set up shell companies or licensees for the purpose of acquiring stations that they can operate in tandem with ones they own." Harry A. Jessell, "Advocacy Groups, Cable Target Virtual Duops," *TVNewsCheck*, March 7, 2012, http://www.tvnewscheck.com/article/2012/03/07/57926/advocacy-groups-cable-target-virtual-duops.

[133] Erwin G. Krasnow, Esq., "Lotsa Money for Communications Attorneys," *Radio & Television Business Report*, (continued...)

> multiple (indeed, repetitive) provisions that say in different ways that the licensee of a broadcast station retains ultimate responsibility for all decisions of the station, including matters relating to finances, personnel and programming.... Here's a nutshell summary of what the FCC looks for in LMAs: The LMA must unequivocally reserve to the licensee/seller the unlimited right to suspend, cancel, or reject any programming furnished or recommended by the lessee/buyer. To remove any doubt, the LMA must make clear that the licensee remains responsible for the salaries of certain employees and certain other costs of the station's operations, as well as for compliance with all regulatory requirements such as maintenance of the public inspection file and political file.

There are good public policy reasons for employing a bright line attribution rule. It allows potential sharing agreement participants to make business decisions with some certainty about the regulatory treatment of the agreement. It minimizes room for varying interpretation and thus fosters predictable and consistent results in its application. It also reduces the FCC staff resources needed to review agreements or to litigate decisions. But, unless the bright line is in no way a constraining factor on market participants, the level at which it is set could have policy implications. In this case, by setting a bright line that consists of a threshold percentage of programming below the level that many television stations allocate to local programming, and by relying heavily on a self-certification process rather than a full review of all available empirical evidence, the FCC has adopted a local television ownership policy that concurrently prohibits duopolies and permits virtual duopolies in many market situations.

The Information and Analysis Needed to Construct Policy on Attribution Rules and Sharing Agreements

In response to its NPRM, the FCC has received considerable anecdotal evidence about sharing agreements. However, as only those sharing agreements that are subject to the attribution rules must be made publicly available, and as broadcasters have every incentive to structure agreements to not fit that category, the Commission has little systematic data. The wide variety of agreements now in use could provide data to perform statistical analyses of the impact of these agreements on such variables as the total level of news programming in the market, the amount of original news programming, the amount of news programming aired by broker stations and brokered stations, advertising rates, retransmission consent rates and retail cable rates. It may be possible, for example, for the FCC to perform statistical analysis to distinguish between markets in which resources are shared but advertising sales and perhaps also actual programming are performed by individual stations and markets with full LMAs.

Since issues of control typically have a financial aspect to them, the FCC also could use data provided by licensees to the Securities and Exchange Commission in their 10-K and other submissions. Sometimes this information is purely financial, for example, as cited above, Nexstar indicated in its 10-K form that it is deemed under U.S. generally accepted accounting principles to have a controlling financial interest in Mission. But sometimes the information provides more general insights about market competition. For example, in the narrative section of its 10-K providing an overview of its business, Mission states that it:

(...continued)

March 14, 2012, http://rbr.com/lotsa-money-for-communications-attorneys/.

> believe[s] that medium-sized markets offer significant advantages over large-sized markets, most of which result from a lower level of competition. First, because there are fewer well-capitalized acquirers with a medium-market focus, we have been successful in purchasing stations on more favorable terms than acquirers of large market stations. Second, in many of our markets only four or five local commercial television stations exist. As a result, we achieve lower programming costs than stations in larger markets because the supply of quality programming exceeds the demand.[134]

Presumably Mission is referring to lower costs for quality entertainment programming available from national networks and syndicators, not to local programming. Still, it suggests that stations in mid-sized markets may not be less advantageously situated than those in larger markets.

The FCC also might look to information provided by television licensees in litigation, such as the antitrust lawsuit that Nexstar filed in 2011 against Granite Broadcasting for entering into exclusive affiliate agreements with two of the four major television networks in Fort Wayne, IN.[135]

Such data collection and analysis might indicate that the current bright line test is appropriate or it might lead the FCC to conclude that different attribution rules are needed to address sharing agreements.

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[134] *Mission Broadcasting, Inc. Form 10-K*, United States Securities and Exchange Commission, March 16, 2011, Commission File Number 333-62916-02, at p. 2.

[135] "Nexstar Broadcasting Files Antitrust Lawsuit against Granite Broadcasting and Its Fort Wayne Indiana Station, WISE-TV," *Business Wire*, July 25, 2011.